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HAROLD B. WILLEY, C

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. 497

ROBERT E. GLASSCOTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinion Below	7–16
Jurisdiction	2
Questions Presented	2
Statute Involved	2–3
Statement	3–4
Reasons for Granting the Writ	4–6
Conclusion	6
Appendix A—Opinion and Judgment Below	7–17

CITATIONS

Cases:	Page
Benham v. United States, 215 F. (2d) 472	4, 5, 6
Berger v. United States, 295 U. S. 78	4, 5
Boyd, et al. v. United States, 142 U. S. 450	4
Capone v. United States, 51 F. (2d) 609	5
Hartman v. United States, 215 F. (2d) 386	5, 6
Himmelfarb v. United States, 175 F. (2d) 924	5
Holland v. United States, — U. S. —	6
Malone v. United States, 94 F. (2d) 281	5
O'Brien v. United States, 51 F. (2d) 193	5
Skidmore, United States v., 123 F. (2d) 604	5
Sur, Sang Soon v. United States, 167 F. (2d) 431	4
Tinkoff v. United States, 86 F. (2d) 868	5

CITATIONS—Continued

	Page
United States v. Skidmore, 123 F. (2d) 604	5
Viereck v. United States, 318 U. S. 236	4
Wolcher v. United States, 200 F. (2d) 493	5
Statutes:	
Section 145(b), Internal Revenue Code of 1939, 53 Stat. 62	2–3

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on November 4, 1954.

CITATIONS TO OPINIONS BELOW

The District Court did not give a written opinion. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 7-16, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1954, Appendix A, p. 17, *infra*. No petition for rehearing was filed. Mr. Justice Minton of this Court on November 29, 1954, granted an extension of time for the filing of this petition to January 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

Whether in a federal criminal prosecution a defendant waives error predicated on the improper admission of evidence of other crimes by inadequate objection where the objectionable character of the evidence has been brought to the attention of the trial court during the course of the trial.

Whether in such a prosecution, evidence of criminal acts other than those charged is properly admitted to establish intent, solely by virtue of its tendency to prove the general character of the defendant.

Whether the admission of such evidence was prejudicial error.

STATUTE INVOLVED

The statutory provision involved is Section 145(b) of the Internal Revenue Code of 1939, 53 Stat. 62, derived from the Act of May 28, 1938, Ch. 289, Section 145(b), 52 Stat. 513:

> "Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under

this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT

This prosecution was commenced by an indictment, filed September 11, 1953, charging the defendant with violation of then Section 145(b), of Title 26, United States Code, in four counts, in that he filed false and fraudulent income tax returns for the years 1944, 1945, 1946 and 1947. The trial in the District Court before a jury resulted in a verdict of guilty with respect to each count. After verdict, the defendant moved for a judgment of acquittal, and in the alternative for a new trial. The only reasons assigned which were relied on before the Court of Appeals were the sufficiency of the evidence and the error of the trial court in admitting evidence tending to show that the defendant had manipulated a trust account under his control to the detriment of its beneficiaries (R. 179), and in permitting the government to comment on this testimony as indicative of the defendant's general character. (R. 410-11, 428). The District Court overruled the motions and entered a judgment on the verdict on December 29, 1953, sentencing the defendant to a term of six months on each count, to be served consecutively.

The court below affirmed this judgment, holding that the evidence was sufficient to present a jury question, and that any error resulting from the admission of the trust account evidence was waived by a failure to object to the trial

court's instruction at the time the evidence was received that it could be considered as evidence bearing on intent.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below on the question of waiver is in direct conflict with the decision of this Court in *Boyd, et al.* v. *United States,* 142 U. S. 450. In that case this Court held that the improper admission of evidence of other crimes is so prejudicial that the error involved is not waived by a failure to object to the court's instructions regarding the purposes for which it may be considered. This Court has indicated on several occasions since the *Boyd* case that conduct prejudicial to a fair trial can be such error that this Court will take cognizance of it without regard to the state of the record. *Viereck* v. *United States,* 318 U. S. 236; *Berger* v. *United States,* 295 U. S. 78.

2. The decision of the court below on the question of waiver is also in direct conflict with the view taken in the Fifth Circuit, *Benham* v. *United States,* 215 F. (2d) 472, and in the Ninth Circuit, *Sang Soon Sur* v. *United States,* 167 F. (2d) 431. In the *Benham* case, the defendant failed to object to an argument of counsel for the government which contained considerable objectionable comment, including a characterization of the defendant as a loan shark and a usurer, and failed to request any curative instruction. The court held the error was prejudicial and was not waived. In the *Sang Soon Sur* case, the defendant did not make timely objection to evidence of unrelated crimes, but the court held, on the authority of the *Boyd* case, that no error was waived.

3. The decision of the court below on the question of the admissibility of the trust account evidence, to the extent that the court decided the question at all in view of its

position on the question of waiver,[1] is in direct conflict with decisions in the Fifth Circuit, *Benham* v. *United States, supra,* the Eighth Circuit, *Hartman* v. *United States,* 215 F. (2d) 386, and the Ninth Circuit, *Wolcher* v. *United States,* 200 F. (2d) 493. In all of these cases the courts restricted proof of other criminal acts to situations where a logical relationship existed between the charge under indictment and the other criminal acts sought to be proved. The record in this case clearly indicates that the evidence of the defendant's asserted manipulation of his trust account had no income effect, did not tend to prove any awareness on his part of the falsity of his returns, and had no such similarity of characteristics with the fraud charged that would permit an inference of design. The sole purpose for its admission was to create the impression in the minds of the jurors that the defendant was a man of evil propensities, more likely than other citizens to commit a crime. (R. 410-11, 428).

4. Whatever view the Court may take of the sufficiency of the evidence to present a jury question in the event certiorari is granted, the record and the opinion of the court below clearly indicate that there was no "overwhelming" evidence of guilt sufficient to eliminate the possibility of prejudice to the defendant, such as this Court discussed in *Berger* v. *United States,* 295 U. S. at 88.

5. The questions presented by this petition are of importance to the administration of federal tax laws and to the conduct of criminal cases in the federal courts. The

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[1] The court below disposed of the petitioner's contentions on the ground that the error had been waived, but stated that the admission of such evidence did not affect "the substantial rights" of the defendant. This view was foreshadowed by the long line of decisions from the Seventh Circuit upholding convictions in which evidence of other crimes was admitted. *Himmelfarb* v. *United States,* 175 F. (2d) 924; *United States* v. *Skidmore,* 123 F. (2d) 604; *Malone* v. *United States,* 94 F. (2d) 281; *O'Brien* v. *United States,* 51 F. (2d) 193; *Capone* v. *United States,* 51 F. (2d) 609; *Tinkoff* v. *United States,* 86 F. (2d) 868.

increasing prosecution of run-of-the-mine cases involving relatively small deficiencies, a development recently noted by this Court in *Holland* v. *United States*, decided December 6, 1954, has magnified this importance.

Cases involving taxpayers who derive their principal income from illegal sources inevitably involve proof of criminal activity, but this petitioner is a practicing attorney without illegitimate sources of income. A business or professional man comes to court with perhaps a stronger presumption of innocence than a gambler, and where his reputation is not open to successful attack, the temptation is great to seek to prove that his character is not the equal of his reputation. Courts have always recognized that such excursions must be closely restrained to prevent injustice.

It is time for an application of basic principles. The frequency with which the questions involved have arisen in the Courts of Appeal in the last few years,[2] and the difference in treatment they appear to have received, makes imperative an authoritative answer from this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALEXANDER CAMPBELL,
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Counsel for the Petitioner.

[2] The *Benham* and *Hartman* cases were decided this year.

APPENDIX A

OPINION AND JUDGMENT BELOW

OPINION

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11093 October Term, 1954. October Session, 1954.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT E. GLASSCOTT, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

November 4, 1954

Before Major, Lindley and Schnackenberg, Circuit Judges.

SCHNACKENBERG, Circuit Judge: This appeal is from a judgment of the District Court entered on the verdict of a jury finding the defendant guilty of wilfully and knowingly attempting to defeat and evade payment of income tax due and owing by him and his wife to the United States for the years 1944, 1945, 1946 and 1947, by filing false and fraudulent joint income tax returns, on February 8, 1949, for the years 1944, 1945 and 1946, and on March 15, 1948, for the year 1947, all in violation of Sec. 145(b), title 26, U. S. C. A. The indictment consisted of one count for each taxable year. A verdict of guilty was returned on each count. Motions for acquittal and for a new trial were overruled

and defendant was sentenced to serve six months on each count consecutively.

There was evidence on the trial, which, if believed, tended to prove the facts which we now set forth.

During and for many years prior to the taxable years in question, defendant was a practicing attorney in Michigan City, Indiana. During the years in question he received some rent from subtenants in his office space in addition to professional fees, interest on bank deposits and income from certain interests in partnerships and corporations. The tax returns which he made were upon a cash receipts basis.

During that part of the years here involved ending in March 1946, Elna R. Anderson, his regular secretary, was absent from the office and book records of cash receipts and expenditures used by defendant in making the returns for these four years were not kept, because of difficulty in obtaining competent help and the defendant's not being present to supervise the office activities. Upon her return, Mrs. Anderson began making entries in the cash books[1] and by 1948 had completed this work. She obtained the information for these entries from slips of paper or "memo" sheets given to her by the defendant. There was also what defendant called a client's ledger book,[2] consisting of two volumes, as well as a trust book or ledger,[3] which contained debit and credit entries, the latter representing amounts due to people whose money defendant held in

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[1] As in the record, these books are sometimes referred to in this opinion as "cash journals," "cash receipts journals," "cash receipt book," "journals" and "cash books."

[2] Sometimes referred to in the record and in this opinion as "accounts receivable book," and "accounts receivable ledger."

[3] This record was not introduced in evidence.

trust. Defendant had a trust account at the bank. That account on December 31, 1947, had a balance of about $1,000, while a statement of the balances and the amounts due to persons, according to a statement prepared by defendant based upon the trust ledger, showed a balance due from defendant of some $17,000. In 1949, defendant explained this situation to Robert A. Inglebright, an agent for the Bureau of Internal Revenue, by stating that the difference represented money which he had borrowed from the trust accounts and which was repayable thereto.

In May 1949, Inglebright went to defendant's office and inquired about his bookkeeping system. Defendant said that he had a cash receipt book which contained his taxable income and that he had expense accounts. When asked specifically if there was some kind of account cards, such as a ledger sheet on each account, or an accounts receivable ledger, he stated that there was none. Defendant turned the cash books over to Inglebright, who examined and checked them against cancelled checks and bank statements. In response to another inquiry about an accounts receivable ledger, defendant stated he had no such record.

Later in the investigation, defendant turned over to Inglebright for inspection the trust ledger, which Inglebright analyzed. About a week after October 26, 1949, while Inglebright was working on the trust accounts, he visited defendant's office but did not find defendant there. There had been no previous arrangement with defendant with regard to making books available when he was absent. The agent asked for the trust ledger and the office girl telephoned to defendant. She thereupon handed to Inglebright a black ledger book which closely resembled the trust ledger with which he had been working. It was not the trust ledger,

but was a ledger with each page showing an account of a client. It appeared to cover accounts alphabetically from "M" to "Z." He inquired of the girl whether or not there was another book containing "A" through "L." She said that there was and she produced it. It had a gray binder. Thereafter defendant appeared and, indicating the two books which had been handed to Inglebright, stated that those were not the books he wanted—that he wanted the trust ledger. When asked whether these were not accounts receivables, defendant stated that they were, that they were the records of the accounts of clients, and that they could be accounts receivable records. He answered in the affirmative when asked whether the credit entries in these two books represented receipts from his clients. He permitted Inglebright to take the two books in order to determine the credits therein.

When Inglebright returned the accounts receivable ledgers he pointed out to defendant a substantial difference among the credit entries in these ledgers, the cash receipts entered in the cash books and the amounts deposited in the bank account. When Inglebright inquired whether the credit postings in these ledgers were for payments by clients for services rendered, defendant answered that they were and should be included as taxable income. After analyzing the accounts receivable ledgers, Inglebright asked defendant to submit to a question and answer statement under oath "for the purpose of obtaining his explanation of the records which had not been presented * * * at the time of the first statement." Defendant replied that, upon advice of legal counsel, he would make "no further statement under oath."

An analysis of the credit postings in the accounts re-

ceivable ledgers, when compared with the cash book and tax returns, showed discrepancies for each of the years in question. Both the cash book and the returns set forth a less amount of income than that shown on the accounts receivable ledgers.

Based upon all of the records submitted to Inglebright, the balances of unreported professional income were: for 1944, $8,516.17; for 1945, $11,674.69; for 1946, $12,582.90, and for 1947, $10,257.27. There were total fees deposited in the checking and saving accounts of defendant which were not recorded in either the accounts receivable ledgers or the cash receipts journals, amounting to $2,441.41 in 1944, $2,462.00 in 1945, $1,849.97 in 1946 and $1,018.13 in 1947.

In December 1948, defendant filed a written application for admission to practice before the Treasury Department. A letter was written to defendant asking whether he had filed returns for 1945 and 1946, and, if not, his reasons for not doing so. In response thereto defendant wrote under date of February 3, 1949, that all of his returns had been filed[1] and the tax paid thereon. The letter stated that the reason for the late filing was "simply my inability to make payment at the time the tax was due, but I have been fortunate enough to arrange a loan to get the matter cleared up."

Defendant's checking account showed deposits for the year 1944 in the sum of $13,261.50, in 1945 in the sum of $23,767.01, in 1946 in the sum of $31,441.76 and during 1947 in the sum of $32,630.56. His savings account showed deposits in 1944 in the sum of $3,194.73, during 1945 in the

[1] The 1944, 1945 and 1946 returns were actually filed on February 8, 1949, and the 1947 return was filed on March 15, 1948.

sum of $2,195.29, in 1946 in the sum of $1,427.07 and in the year 1947 in the sum of $476.14. Interest on the deposits in the savings account for 1946 was $146.57 and in 1947 was $167.39. This interest was not reported on the returns for these two years and defendant agreed with the agent that such interest should have been reported.

The balance in the checking account on March 15, 1945 was $1,027.64 and in the savings account $8,337.44. The balance in the checking account on March 15, 1946 was $879.63 and in the savings account $10,373.29. The balance in the checking account on March 15, 1947 was $1,405.12 and in the savings account $11,794.53.

There were the following expenses for which defendant took credit on his returns, for which he was subsequently reimbursed and which reimbursement did not appear upon the returns as income: $41.60 in 1944, $1,043.16 in 1945, $729.56 in 1946 and $476.22 in 1947. Defendant admitted that such items should have been on the return as income.

The returns for these four years were prepared by an accountant named Mathias upon information received by him from defendant. Mathias made no audit of the records.

There was also evidence, which if believed, tended to prove the facts set forth below.

During the absence of Elna R. Anderson, defendant's office was in a continual state of confusion because of lack of secretarial help; he had numerous high school girls for short periods of time; the files were improperly maintained or not maintained at all. Defendant testified that he gave Inglebright all of the records which were introduced at the trial.

During a part of the years 1946 and 1947 defendant was not present in his office at all, due to ill health. In 1944 the defendant began a gradual decline of health, which, in 1947, resulted in a coronary attack. In October of that year he required medical treatment. This condition continued through the trial.

There was also evidence given by defendant's family physician that he could not say whether this condition of the defendant had any effect upon his mind insofar as his ability to practice law was concerned, and that defendant "was perfectly poised on every examination." A defense witness who testified that he obtained the services of a physician for defendant in March 1948, while on a trip to Florida with defendant, stated that he "considered defendant as sharp and astute mentally as he was before."

1. It is not denied that defendant had unreported taxable income in 1944, 1945, 1946 and 1947. He contends, however, that the evidence does not prove wilfulness or intent to understate his income, which is an essential ingredient of the statute.[1]

The key word in this statute is "wilful." It is an essential ingredient of the crime. Wilful is distinguished from accidental. Under this statute that which is wilful is an actual, intentional wrong doing with the purpose of evading the tax. It is not established by negligence, however gross. Wilfulness is a subjective state in most in-

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[1] Sec. 145(b), title 26 U. S. C. A., which reads, in part: "* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." See *Spies* v. *United States*, 317 U. S. 492.

stances. This subjective state, of course, may be shown to exist by various statements and conduct.

In *Spies* v. *United States,* 317 U. S. 492, at 499, the court said:

> "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

In the case at bar, whether or not the evidence justified a conclusion that the admitted understatements of income were due to wilfulness was a question for the jury. Implicit in their verdict of guilty is a finding of wilfulness. There was evidence to sustain this finding. When asked by Inglebright to produce all of his records defendant withheld his accounts receivable ledgers. Upon at least two occasions he was asked specifically if he had any accounts receivable books or ledgers and his answers were in the negative. Quite by inadvertence Inglebright came into possession of these ledgers. When confronted with that fact, defendant admitted their existence for the first time and when pressed for an explanation under oath as to why there was a discrepancy between those ledgers and records voluntarily submitted, he refused such a statement upon advice from counsel. The cash receipts journals were made up long after the receipts of the monies therein shown. They were made by Mrs. Anderson from memoranda on slips of paper handed to her by defendant.

The totals so entered were gross understatements of the totals appearing in the accounts receivable ledgers.

The jury had before it for consideration the evidence by which defendant sought to explain his incorrect returns.

Significant facts which the jury could have found on the evidence submitted were: a gross discrepancy between the income reported and the income received, defendant's groundlss excuse of financial inability to make payment of his taxes when due, the experience and education implicit in his status of a lawyer, his training in income tax matters, which convinced him that he was qualified to practice before the Treasury Department, and his purposeful withholding from Inglebright of his accounts receivable ledgers. The jury might reasonably have then concluded that these facts were badges of fraud which established beyond a reasonable doubt that defendant's understatement of his income was a wilful attempt to evade or defeat his income tax.

There is substantial evidence in the record to support the findings of the jury and neither the trial judge nor this court has a right to disturb that verdict.

2. Inglebright testified in direct examination by government counsel in regard to the fact that defendant's balance in his trust account at the bank on December 31, 1947, was about $1,000 and that his trust account ledger showed that he owed a balance on trust accounts totalling about $17,000. When he asked defendant about this situation, he was told that the deficit represented money which defendant had borrowed from trust accounts. At the time of this conversation defendant was concealing from Inglebright the existence of the accounts receivable ledgers. He had turned

over to Inglebright the trust ledger. Thus handicapped, Inglebright was attempting to ascertain defendant's income. While the discrepancy between the trust ledger and the trust bank account actually had no bearing upon the amount of defendant's income, it was a natural subject of conversation between the two men and was not a foreign subject intentionally interjected by the government. There was no objection by defense counsel to the foregoing evidence. Then, without any question to him, Inglebright volunteered "we discussed the effect that might come up as the result of a prosecution and I asked what would happen if the newspapers carried a headline to the effect that prominent local attorney had been prosecuted." Defense counsel stated that his answer was highly prejudicial, irrelevant, improper and immaterial. He made no motion of any kind.

Thereupon the court indicated that the last statement by the witness was not proper and that it was prejudicial and could be "inflammable as far as the jury's mind is concerned." The court thereupon instructed the jury to disregard the conversation of the witness with the defendant regarding a newspaper headline and that the jury should disregard the last remark. The court also remarked that the other evidence was admissible and that he believed "the cases hold that evidence of commission of other crimes in connection with tax matters is admissible to show intent," though he wanted the jury "to understand that the court is not inferring that any other crime was committed."

Evidently, counsel for both sides were satisfied with this instruction. In any event, defense counsel offered no objection to it and made no motion in regard thereto. In this state of the record, defendant is in no position to complain in this court. The manner in which the court attempted

to eradicate the effect, if any, of the volunteered statement of the witness was not excepted to in any way. We do not think that this incident in any way affected the substantial rights of the defendant. From an examination of the entire record, we believe that substantial prejudice does not appear and that, if this be error, it must be regarded as harmless. *Berger v. United States,* 295 U. S. 78 at 82.

For reasons hereinbefore set forth, the judgment of the District Court is

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Ill.

Thursday, November 4, 1954

Before

HON. J. EARL MAJOR, Circuit Judge
HON. WALTER C. LINDLEY, Circuit Judge
HON. ELMER J. SCHNACKENBURG, Circuit Judge

11093 UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT E. GLASSCOTT, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby,

AFFIRMED.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U.S. 860	6
Malone v. *United States*, 94 F. 2d 281, certiorari denied, 304 U.S. 562	6

Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U.S.C. 145)	2

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 497

ROBERT E. GLASSCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. 7-17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 17-18) was entered November 4, 1954. By order dated November 29, 1954, Justice Minton extended the time for filing the petition for certiorari to Jan-

uary 3, 1955. The petition was filed December 27, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 124(1).

QUESTION PRESENTED

Whether the trial court erred in admitting testimony respecting deficiencies in petitioner's trust funds where petitioner made no objection to such testimony, made no motion in regard thereto, and requested no instruction thereon.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

STATEMENT

On September 11, 1953, a four-count indictment was filed against petitioner in the United States District Court for the Southern District of Indiana, charging him with willful attempts to evade income taxes in violation of Section 145(b) of the Internal Revenue Code of 1939. The four counts charged him with filing fraudulent individual returns for himself and his wife for the years 1944-1947, inclusive. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 1-3):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1944)....	$ 4,730.71	$ 463.00	$12,206.87	$2,876.55
Count II (1945)....	10,667.16	2,306.84	23,691.42	8,607.94
Count III (1946)....	8,420.25	1,272.31	22,764.28	7,037.60
Count IV (1947)....	10,067.87	1,738.84	22,254.75	6,773.52

After a jury trial petitioner was found guilty as charged (R. 452) and on December 29, 1953, he was sentenced to six months imprisonment on each count, the sentences to run consecutively (R. 456).

Since the sufficiency of the evidence to support the verdict is not questioned in the petition (Pet. 2), it is sufficient to note here that the court below summarized the evidence as showing that the petitioner, a practicing attorney, failed to report various items of income from his practice and other sources and that willfulness was indicated by the gross discrepancy between income received and income reported, by petitioner's experience and training, and by his concealment of certain ledgers which recorded part of the unreported income. (Pet. App. 12-15.)

The issue raised by the petition is whether reversible error was committed by the admission of testimony by a special Treasury agent with respect to the petitioner's manner of handling a trust account. The facts with respect to this testimony appear as part of the argument below.

ARGUMENT

Petitioner contends (Pet. 4-5) that the trial court erred in admitting the testimony of a special Treasury agent concerning petitioner's trust account. The agent testified that petitioner's balance in his trust account at the bank on December 31, 1947, was $1,000, whereas his trust ledger and a balance prepared by petitioner for the agent showed that he owed a balance on trust accounts totaling $17,000. (R. 178-179.) Petitioner's explanation to the agent had been that he had borrowed this money from the trust accounts and had used it for personal investments. (R. 179-180.) No objection was made to this evidence.

Petitioner did object, however, when the agent volunteered the testimony (R. 179):

> * * * we discussed the effect that might come up as the result of a prosecution and I asked what would happen if the newspapers carried a headline to the effect that prominent local attorney had been prosecuted.

Counsel stated that this statement was prejudicial and improper, but he made no motion for a mistrial. The court told the jury to disregard the statement

concerning the newspaper headline. The court also ruled (R. 180) that the other evidence about the trust account was admissible and that he believed "the cases hold that evidence of commission of other crimes in connection with tax matters is admissible to show intent," though he wanted the jury to "understand that the Court is not inferring that any other crime was committed".

Following this instruction it appeared that both sides were satisfied since petitioner made no motion for a mistrial and requested no further instruction to the jury. In view of the close relationship between the petitioner's handling of the trust funds and his methods of recording his own income, and in view of the court's prompt admonition to the jury to disregard the remark about prosecution for some other offense, we think it clear that the court below was correct in holding that the conviction should not be set aside. The court said:

> We do not think that this incident in any way affected the substantial rights of the defendant. From an examination of the entire record, we believe that substantial prejudice does not appear and that, if this be error, it must be regarded as harmless. [Pet. App. 17.]

Petitioner cites (Pet. 4-5) several cases to support his argument that a conviction in a criminal case can be reversed even though no objection was made to the admission of prejudicial evidence and even though no instruction was requested to eradicate the alleged harmful effects of such evidence. Whether prejudicial error has been committed de-

pends on the circumstances of the particular case; and each of the cases relied upon by petitioner is clearly distinguishable on its facts.

Nor should the verdict be upset because government counsel referred to the evidence in his closing argument. In his argument to the jury defense counsel referred to testimony picturing petitioner as an upright professional man. (R. 417-418.) To this, the prosecutor justifiably respon led by pointing out that petitioner had been using clients' funds for his own benefit. (R. 428.) In *Malone* v. *United States,* 94 F. 2d 281, 288 (C. A. 7th), certiorari denied, 304 U. S. 562, the court said:

> Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel * * *. * * *

See also *Himmelfarb* v. *United States,* 175 F. 2d 924, 950 (C. A. 9th), certiorari denied, 338 U. S. 860.

CONCLUSION

The decision of the court below is correct; there is no conflict of decisions, and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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